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No. 88-12

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

GEORGE M. MORTON and
MARLENE J. MORTON,
Petitioners,

v.

TOM GARDNER, as Executive Director,
Department of Natural Resources,
STATE OF FLORIDA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED FOR REVIEW

The first question presented has been restated to reflect the fact that the State acted upon probable cause in seizing Petitioners' fishing vessel.

1. Whether the seizure and 124-day detention of a commercial fishing vessel by State authorities during the pendency of a civil forfeiture action in which there was a judicial determination of probable cause and no unnecessary delay in going forward with the proceeding gives rise to a claim for Just Compensation for a temporary "taking" under the Fifth and Fourteenth Amendments to the United States Contitution, pursuant to this Court's decision in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, ____ U.S. ____, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987).

2. Whether the decision of this Court in The Apollon, 22 U.S. (9 Wheat) 362, 6 L.Ed. 111 (1824), continues to stand for the principal that a seizing officer seizes at his own peril, that probable cause is not a defense to a seizure absent a statute setting up such a defense, and that the seizing authority is liable in tort to the owner of a seized vessel upon dismissal of the condemnation petition.

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STATEMENT OF THE CASE

The Third District Court of Appeal of Florida ruled that because of the undisputed existence of probable cause to support the propriety of the seizure of a fishing vessel under the Florida Contraband Forfeiture Act and the absence of unnecessary delay in going forward with the proceedings, the Petitioners' claims for loss of use in tort and in inverse condemnation failed. Morton v. Gardner, 513 So.2d 725 (Fla. 1st DCA 1987). The Florida Supreme Court declined to accept jurisdiction to review the decision of the Third District Court of Appeal. Morton v. Gardner, 525 So.2d 879 (Fla. 1988).

SUMMARY OF ARGUMENT

Petitioners first seek to invoke this Court's discretionary jurisdiction on the ground that a 124 day detention by state authorities during the pendency of a civil forfeiture proceeding constitutes a compensable taking pursuant to this Court's decision in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, ____ U.S. ____, 107 S.Ct. 2378 (1987). Petitioners' reliance on this decision is misplaced, for there was no contention below, nor is there here, that a 124 day detention period was unreasonable. The contention that such delay is an unconstitutional deprivation of private property for which compensation must be provided therefore has no foundation in the record of this case, and should not be entertained by this Court. Moreover, such a ruling would be the death

knell for all state and federal contraband forfeiture laws since the cumulative fiscal burden of such cases would preclude enforcement.

The second question presented for review is purely a state tort law issue. Petitioners state they seek to invoke this Court's discretionary jurisdiction pursuant to 28 U.S.C. ss. 1257(3) and 2101(c). They fail, however, to demonstrate how a Florida court's interpretation of Florida tort law implicates the validity of a treaty or statute of the United States, or the constitutionality of a state statute. While the first question expressly references the Fifth Amendment right to just compensation, the second question and accompanying argument is a mere recitation of federal tort law which has no controlling effect on the present case.

Review should be denied.

ARGUMENT

A. SEIZURE AND A 124 DAY DETENTION OF A COMMERCIAL FISHING VESSEL BY STATE AUTHORITIES DURING THE PENDENCY OF A CIVIL FORFEITURE ACTION IN WHICH THERE WAS A JUDICIAL DETERMINATION OF PROBABLE CAUSE AND NO UNNECESSARY DELAY IN GOING FORWARD WITH THE PROCEEDING DOES NOT GIVE RISE TO A CLAIM FOR JUST COMPENSATION FOR A TEMPORARY "TAKING" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioners rely solely on this Court's decision in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, ____ U.S. ____, 107 S.Ct. 2378, 96 L. Ed.2d 250 (1987), in arguing that a 124-day detention during the pendency of forfeiture proceedings gives rise to a compensable claim under the Fifth Amendment. After waving First English like a magic wand they pass on to a discussion of federal tort law. Nothing in the First

English decision suggests that it has any application to forfeiture proceedings.

First English involved a regulatory land use ordinance adopted by Los Angeles County which effectively deprived the Church of all use of its real property for a number of years. The ordinance prohibited the construction or reconstruction of any building or structure in an interim flood protection area which included the Church land. The landowner sought to recover damages in inverse condemnation and tort. Other than the theories of recovery, First English and the instant case have nothing in common[1]. This Court in First English narrowly held that, under the circumstances in that case, the landowner was entitled to compensation for

[1]Note, however, this Court in First English did not consider the appellant's tort claim nor did it apply federal tort law principles to the case.

the period of time during which the taking was effective.

In the First English case, the interim ordinance was adopted by the county in January of 1979, and became effective immediately. When the Supreme Court of California denied a hearing in the case on October 17, 1985, the merits of appellant's claim had not been determined. Thus, this Court was concerned with the deprivation of property over a period of years. In contrast the "deprivation" in the present case was only 124 days, a reasonable time for a judicial determination of the Morton's right to the return of their boat under the Florida Contraband Forfeiture Act. As the decision below notes, the Mortons did not contend that the period was unreasonable, nor do they so contend in their petition before this Court. See, Morton v. Gardner, 513 So.2d 725, 730 (Fla.

3rd DCA 1987) (Appendix to Petition at 16).

The decision in First English was expressly limited to the facts presented and did not "deal with the quite different questons that would arise in the use of normal delays in obtaining building permits, changes in zoning ordinances, variances and the like . . . ." 107 S.Ct. at 2389. The decision therefore, premised as it is on a delay of some six or seven years and expressly limited to its facts, is no precedent for holding that the brief time - 124 days - it took for the Florida forfeiture proceeding to run its course is likewise a taking. In fact, because petitioners have never questioned the reasonableness of this time frame, they have not properly preserved the constitutional issue that First English addresses.

The First English decision stands upon a well-established body of decisional law holding that government must provide compensation when it has exercised its right to use private property. Some of those decisions are cited in the First English case. See, e.g., Kimball Laundry Co. v. United States, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949) (temporary use by the Army of a laundry plant); United States v. Petty Motor Co., 327 U.S. 372, 66 S.Ct. 596, 90 L.Ed. 729 (1946) (temporary use by United States of tenants' leasehold interests); United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945) (temporary occupancy of a leased building).

In each of these cases the government was acting pursuant to its condemnation powers and had taken specific property rights and interests for government use.

Appellants, however, have cited no case ruling that the government is required under the Fifth Amendment to compensate a property owner for the temporary loss of use resulting from a contraband forfeiture proceeding where there has been a judicial determination of probable cause for the seizure and no unnecessary delay in reaching a final determination.

Forfeiture provisions are an important weapon in both the federal and state battle against the growing drug trafficking problem. Given the nature of the underlying public policy being served, the process due an owner under the Fifth and Fourteenth Amendments is limited. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed. 2d 452 (1974), in which this Court noted that "preseizure notice and hearing might frustrate the interests served by the

statutes, since the property seized . . . will often be of a sort that could be removed to another jurisdiction, destroyed or concealed, if advance warning of confiscation were given." 416 U.S. at 679, 94 S.Ct. at 2090, 40 L.Ed. 2d at 466. Likewise, the government's liability for consequential damages arising out of contraband-related property seizures, in order for forfeiture to be an effective tool, must be narrowly limited.

Under federal forfeiture statutes liability is limited where:

> if it appears that there was reasonable cause for the seizure, the court shall cause a proper certificate thereof to be entered and the claimant shall not in such case, be entitled to costs, nor shall the person who made the seizure, nor the prosecutor, be liable to suit or judgment on account of such suit or prosecution.

28 U.S.C. §2465.

Federal courts have held that the existence of probable cause for the seizure operates as a barrier to the recovery of damages against the United States. United States v. 1500 Cases, More or Less, 249 F.2d 382 (7th Cir. 1957). As pointed out in the decision below, while Florida statutes lack the protection from damage suits given federal officers by the probable cause certificate, no forfeiture proceeding can go forward without a determination that probable cause existed. (Appendix to Petition at 8). Where there is a judicial determination of probable cause a successful claimant is entitled only to the return of his property. Morton v. Gardner, supra; In Re Approximately Forty-Eight Thousand Nine Hundred Dollars in U.S. Currency, 432 So.2d 1382, 1385 n.6 (Fla. 4th DCA 1983).

Due process also requires that a prompt post-seizure hearing be provided. Castleberry v. Alcohol, Tobacco & Firearms Division, 530 F.2d 672 (5th Cir. 1976). Florida law likewise requires prompt forfeiture proceedings. Section 932.704(1), Florida Statutes, in relevant part, provides:

> The state attorney within whose jurisdiction the contraband article, vessel, motor vehicle, aircraft, or other personal property has been seized because of its use or attempted use in violation of any provisions of law dealing with contraband, or such attorney as may be employed by the seizing agency, shall promptly proceed against the contraband article, vessel, motor vehicle, aircraft, or other personal property by rule to show cause in the circuit court within the jurisdiction in which the seizure or the offense occurred . . . . (e.s.)

As stated, Petitioners have at no time contended that the length of the detention was unreasonable.

The federal forfeiture cases curiously cited by Petitioners under their state law tort argument (Petition, Point B), cannot support their constitutional claim based upon a "temporary taking." Although rooted in the Fifth Amendment, these decisions stand on the reasonable proposition that where the government sells or destroys seized property and the owner later prevails in the forfeiture proceeding, the owner is entitled to receive the value of what was taken. See Lowther v. United States, 480 F.2d 1031 (10th Cir. 1973) (owner entitled to compensation for guns destroyed by government after seizure); United States v. One 1965 Chevrolet Impala Convertible, 475 F.2d 882 (6th Cir. 1973) (owner whose automobile was returned to him by government was also entitled to damages for depreciation during the time the vehicle was in government custody); United

States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353 (5th Cir. 1972) (owner may proceed under Tucker Act to recover vehicle which had been improperly forfeited for unpunishable conduct); Castleberry v. Alcohol, Tobacco & Firearms Division, 530 F.2d 672 (5th Cir. 1976) (if claimant prevails in forfeiture he may sue government for monetary damages under Tucker Act; nature of damages not defined); but see, Jarboe-Lackey Feedlots, Inc. v. United States, 7 Cl.Ct. 329 (1985) (no recovery for temporary seizure of meat thought to be implanted with unlawful drugs, as such action is inherent exercise of police power and hence noncompensable).

No decision cited by Petitioners stands for the proposition that a prevailing property owner in a forfeiture proceeding is entitled to damages for the loss of use of his property during the pendency of the

action. The forfeiture decisions cited above hold only that the government is obligated to return the property or compensate the owner for the full (undepreciated) value of what was taken. The court below ruled that the Mortons had waived any claim for damage to their fishing vessel. Morton v. Gardner, supra, at 731, n.15 (App. to Petition at A-17). It is clear then that what the Mortons seek to recover are damages to their fishing business. Such damages are not recoverable under the Fifth Amendment. Even where the government condemms a temporary interest in property, it is not obligated to pay business damages. United States v. General Motors Corp., 323 U.S. 373, 383 (1945) ("injury to the business . . . in this case, as in the case of the condemnation of a fee, must be excluded from the reckoning").

B. THE DECISION OF THIS COURT IN THE APOLLON, 22 U.S. (9 WHEAT) 362 (1824), IS NOT BINDING UPON STATE COURTS AND PRESENTS NO BASIS FOR THE EXERCISE OF THIS COURT'S JURISDICTION.

In The Apollon, 22 U.S. (9 Wheat) 362 (1824), this Court decided a claim essentially tortious in nature against a United States tax collector for the wrongful seizure of a French vessel. The decision addressed no constitutional issue or provision. It held that under the law of "municipal seizures," as applied in the federal courts, the seizing officer was liable for damages unless the court, pursuant to statutory authorization, found probable cause for his actions. Id. at 372.

Although The Apollon and other federal forfeiture cases were addressed below in the decision of the Florida Third District Court of Appeal, the ruling on the tort

claim was grounded wholly in Florida law:

> Although Florida statutory law lacks the protection from damage suits given federal officers by the probable cause certificate, no forfeiture proceeding can go forward under the Florida scheme without a determination that probable cause existed. Following a seizure, the State must promptly proceed against the property by petition for a rule to show cause. §932.704(1), Fla.Stat. (1983). The claimant's exclusive avenue of recovery then becomes the forfeiture proceeding itself, where he may prove by a preponderance of the evidence (as the Mortons did here) that the forfeiture statute was not violated. But a successful claimant becomes entitled only to the return of his property. In Re Approximately Forty-Eight Thousand Nine Hundred Dollars in U.S. Currency, 432 So.2d 1382 1385 n. 6 (Fla. 4th DCA 1983); § 932.701(1).
>
> The process, then, has two steps: (1) seizure, the validity of which depends on the presence of probable cause to believe that the property seized was being used in violation of the Act, and (2) forfeiture, the validity of which depends on a finding that the property seized was in fact being used in

> violation of the Act and is thus forfeitable. The Mortons do not dispute that the seizure was based on probable cause, they merely contend that the finding that the vessel was not in fact being used in violation of the Act retroactively invalidates the seizure. The contention is without merit, and we reject it.

Morton v. Gardner, 513 So.2d 725, 768-729 (Fla. 3rd DCA 1987). As the court below read the Florida statute, the existence of probable cause forecloses any damage remedy. If probable cause is found to exist, the claimant's remedy is to prove that he did not violate the forfeiture statute.

The Petitioners herein have not shown either that federal law controlled the tort claim or that the Florida court's decision was grounded in other than state law. Hence, regardless of whether the instant decision is perfectly consistent with the ruling in The Apollon or other federal

cases applying nonconstitutional principles, this Court lacks jurisdiction to review a question of Florida tort law.[2] Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions"). Although federal forfeiture cases, including The Apollon, may have been discussed in the opinion below "[t]his Court . . . reviews judgments, not statements in opinions." Black v. Cutter

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[2] Petitioners acknowledge that the issue is strictly a matter of Florida law: "The State of Florida has waived sovereign immunity for tortious acts of its employees, including intentional torts as long as those employees are acting within the scope of their employment. Fla.Stat. §768.28. Seizure and detention of a vessel is, at a minimum, the intentional tort of interference with property." (Petition at 24)

Laboratories, 351 U.S. 292, 297 (1956). The tort claim presented no basis for the adjudication of any federal right. Hence, this Court's jurisdiction, if any, depends strictly upon the Fifth Amendment "temporary taking" claim based upon the 124 days required to resolve the forfeiture action.

CONCLUSION

This Court's decision in First English was based upon an assumption that the Los Angeles County ordinances denied appellant all use of its property for a considerable period of years. Petitioners never contended that the 124 day temporary detention of their fishing vessel during the pendency of the forfeiture proceeding was an unreasonable delay. Expansion of the holding in First English to a reasonable, temporary detainment of a boat during a contraband forfeiture action is unwarranted. Federal tort law principles as stated in The Apollon have no applicability to Florida tort law. Review should be denied.

Respectfully submitted this 27th day of September, 1988.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA has been furnished, by U.S. Mail, to James Stewart Mattison, James S. Mattson, P.A., Post Office Box 586, Key Largo, Florida 33037, Attorney for Petitioner, this 27th day of September, 1988.

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